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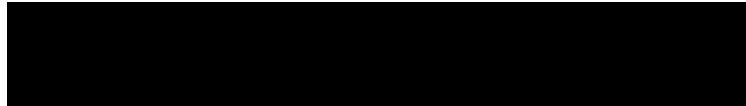
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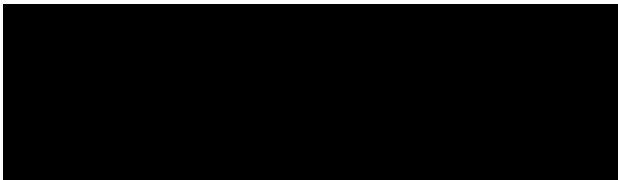
FILE: WAC 02 081 52041 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for a Alien Worker as a Skilled Worker or Professional Pursuant to  
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*[Signature]*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a member of the professions who holds a baccalaureate degree or a foreign equivalent degree. The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that the petitioner's financial information establishes its ability to pay the beneficiary's proffered wage.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold a baccalaureate degree or a foreign equivalent degree and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is April 26, 2001. As noted by the director, the beneficiary's salary as stated on the labor certification is \$29.13 per hour or \$60,590.40 annually.

The petitioner initially included a copy of its 1999 Form 1065, U.S. Partnership Return of Income as evidence of its ability to pay the offered salary to the beneficiary as of the visa priority date and continuing until the beneficiary's receipt of lawful permanent residence. The employer tax identification number shown on this return is 95 4336629.<sup>1</sup> The director requested further evidence pursuant to 8 C.F.R. § 204.5(g)(2) on March 26, 2002. He specifically instructed the petitioner to submit evidence relating to its ability to pay the proffered wage from the priority date of April 26, 2001 to the present, including its 2001 income tax return, quarterly wage reports, and business payroll summary (W-2's and W-3's) evidencing payment of wages to its fifteen employees.

In response, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for the tax year 2001

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<sup>1</sup> The return is filed in the name of "Totos Lechon Manok #2."

filed under the name of Toto Foods, Inc. The federal employer tax identification number of 95 4759748 is set forth on this tax return.<sup>2</sup> This is the same identification number appearing on the I-140 immigrant petition. The tax return indicates that it covers the fiscal year from October 1, 2000 through September 30, 2001. It contains financial data indicating that the petitioner had gross receipts/sales of \$1,198,928, officers' compensation of \$48,000, salaries and wages of \$261,871, and a taxable income before net operating loss deduction of -\$100,722. Schedule L reflects that the petitioner had net current assets of \$20,532. The quarterly payroll report submitted with this tax return indicates that the petitioner paid the beneficiary wages totaling \$12,408.58 between April 2001 and September 30, 2001. The employer account number appearing on this report is 384-25328.

The director denied the petition, concluding that the petitioner had not established its ability to pay the proffered wage in the year 2001. The director noted that the petitioner's taxable income was a negative balance and its net current assets represented less than half the beneficiary's wage in 2001. The AAO concurs. The AAO also notes that the difference between the wages actually paid to the beneficiary and the proffered wage is \$48,181.82. Neither the petitioner's taxable income (before net operating loss deduction) of -\$100,722 nor its net current assets of \$20,532 could cover this amount. While it is noted that the information contained on Part B of the ETA 750 indicates that the petitioner has employed the beneficiary since December 2000, the record only contains evidence of wages paid to the beneficiary beginning with the quarter ending June 30, 2001. The petitioner did not submit a copy of the beneficiary's W-2. Even imputing another quarter's wages to be added to the beneficiary's salary still results in a shortfall of approximately \$42,000. This sum could not be satisfied by either the petitioner's taxable income or net current assets as shown on its 2001 corporate tax return.

On appeal, counsel submits portions of the 2000 and 2001 Form 1120, U.S. Corporation Income Tax Return for a business named "Angel Baby Food, Inc." The employer tax identification number given on the tax returns is 95-4826903. Counsel also submits payroll records for an employer with the tax identification number of 95 4689243. Counsel states that the petitioner's employment identification number is 95-4826903. This is contrary to the evidence shown in the record as noted above. Counsel further asserts that in October 2000, "Totos, EIN-95-4674529, a sole proprietorship, and Totos Eagle Rock, EIN-95-4826903, a sole proprietorship, effected a non-taxable exchange by transferring the assets and liabilities to a newly organized corporation, Angel Baby Food, Inc., EIN-95-4826903." The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The only corroboration of counsel's assertion is a handwritten unsigned statement contained within the materials submitted on appeal. Counsel contends that this information shows that the president of Toto Foods Inc. is expanding his business and that the financial information contained in these tax returns should be considered as part of the petitioner's ability to pay the proffered wage. Counsel refers to the increase in the gross receipts or sales of Angel Baby Food, Inc. and one of its predecessor components as supporting the petitioner's ability to pay. The AAO cannot agree based on the evidence in the record.

The evidence in the record indicates that the petitioner is organized as a corporation filing distinct tax returns with a different federal tax identification number than those mentioned on appeal. There is no objective evidence present in the record of proceeding to establish that a merger or acquisition has taken place or that the financial data of a different corporation can be used to establish the petitioner's ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of its stockholders or of other enterprises or corporations cannot be considered in determining the

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<sup>2</sup> The petitioner obtained its labor certification under the same name as given on the immigrant visa petition, "Toto Foods, Inc. dba Toto's Lechon Manok."

petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980).

Counsel also contends that *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable in this case where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. Counsel notes that Angel Baby Food, Inc. showed increasing sales compared to one of the prior sole proprietorships.<sup>3</sup> *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*. Nor has it been shown that 2001 was an uncharacteristically unprofitable year for the petitioner or that the petitioner is even the same business entity as those referred to by counsel.

Counsel further asserts that the bank statements of Angel Baby Food, Inc. support the petitioner's ability to pay. As noted above, the evidence does not establish that the petitioner and Angel Baby Food, Inc. are the same entity, but rather two are separate corporations. Absent contractual evidence that the petitioner and Angel Baby Food, Inc. share mutual rights, duties and financial obligations, information relating to one business cannot be considered to support the ability to pay the proffered wage on behalf of the other business.

Accordingly, based on the evidence contained in the record and the foregoing discussion, the petitioner has not demonstrated that it has established its ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>3</sup> The record fails to establish a relationship between Angel Baby Food, Inc. and the petitioning corporation.